



1 Specifically, Petitioner claimed his rights were violated because the trial court prevented him  
2 from using his own transcript of the victim's interview, rather than that the less complete  
3 transcript prepared by the government, during cross examination of the victim. Exh. B, pp.  
4 2-5. In a memorandum decision filed on February 23, 2007, the Arizona Court of Appeals  
5 found the claim meritless and affirmed Petitioner's convictions and sentences. Exh. A, pp.  
6 5-6. Petitioner did not seek review by the Arizona Supreme Court. Exh. C.

7 On May 1, 2007, Petitioner filed a timely Notice of Post-Conviction Relief ("PCR")  
8 in the trial court. Exh. D. Petitioner filed the PCR petition on November 30, 2007, and  
9 raised three claims of ineffective assistance of counsel ("IAC") under *Strickland v.*  
10 *Washington*, 446 U.S. 668 (1984). Exh. E. Petitioner claimed that his counsel:

11 should have had the Petitioner testify or, at a minimum, prepared  
12 him to testify and discussed the merits of his testimony with  
13 him. He should have used the ATM receipt showing the  
14 Petitioner withdrew money from the ATM shortly before the  
alleged offense. Finally, his cross examination of the victim  
should have been much better [and], had he prepared for the  
cross examination, it would have been.

15 Exh. E, p. 7. The trial court, after extensive analysis under *Strickland*, found the three claims  
16 without merit. Exh. F.

17 Petitioner sought review of the trial court's decision by the Arizona Court of Appeals.  
18 In his Petition for Review, Petitioner reurged only one claim: that his counsel had been  
19 ineffective in his handling of Petitioner's decision not to testify. Exh. G. In a Memorandum  
20 Decision filed on November 25, 2008, the Court of Appeals granted review, but denied relief,  
21 stating that "the trial court clearly and correctly addressed the merits of [Petitioner's]  
22 ineffective assistance of counsel claim . . . ." Exh. H.

23 On February 25, 2009, Petitioner filed a petition for review in the Arizona Supreme  
24 Court. Exh. I. Petitioner noted that there were "[a]dditional instances of ineffective  
25 assistance of counsel" that were not decided by the court of appeals. Exh. I, p. 2. Although  
26 he does not cite *United States v. Cronin*, 466 U.S. 648 (1984), in his petition, Petitioner  
27 clearly relies on *Cronin's* holding when he argues that:

Defense counsel who entirely fail[s] to subject [the] state's case to meaningful adversarial testing denied the defendant's Sixth Amendment rights, making the adversary process presumptively unreliable. In such a case no showing of prejudice is required.

Exh. I, p. 2. The petition for review was denied by the Arizona Supreme Court and the Court of Appeals issued the mandate on June 5, 2009. Exh. J.

In his pending habeas petition, which was timely filed on August 28, 2009, Petitioner identified Ground One (his only claim for relief) as "Ineffective Assistance of Counsel: Failure to Establish Defense," and explains that:

Petitioner's counsel so utterly failed to defend against the charges that the trial was the functional equivalent of a guilty plea, rendering counsel's representation presumptively inadequate, violating his rights under the 6<sup>th</sup> and 14<sup>th</sup> Amendments. Specifically, trial counsel failed to establish Petitioner's defense that the sexual contact with his accuser was a consensual sexual encounter with a prostitute. *Strickland v. Washington*, 466 U.S. 668 (1984); *U.S. v. Cronin*, 466 U.S. 648 (1984).

*Petition* (Doc. 1), Attachment "A," p. 1.

## **II. LEGAL DISCUSSION**

### **A. Exhaustion of State Remedies**

Respondent contends that Petitioner has failed to exhaust his state remedies for the claim made pursuant to *United States v. Cronin*, 466 U.S. 648 (1984) in the petition. A state prisoner must exhaust the available state remedies before a federal court may consider the merits of his habeas corpus petition. *See* 28 U.S.C. § 2254(b)(1)(A); *Nino v. Galaza*, 183 F.3d 1003, 1004 (9<sup>th</sup> Cir. 1999). Exhaustion occurs either when a claim has been fairly presented to the highest state court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or by establishing that a claim has been procedurally defaulted and that no state remedies remain available, *Reed v. Ross*, 468 U.S. 1, 11 (1984).

Exhaustion requires that a habeas petitioner present the substance of his claims to the state courts in order to give them a "fair opportunity to act" upon these claims. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). A claim has been "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based.

1 *Picard v. Connor*, 404 U.S. 270, 277-78 (1971); *Rice v. Wood*, 44 F.3d 1396, 1403 (9<sup>th</sup> Cir.  
 2 1995). The operative facts must be presented in the appropriate context to satisfy the  
 3 exhaustion requirement. The fair presentation requirement is not satisfied, for example,  
 4 when a claim is presented in state court in a procedural context in which its merits will not  
 5 be considered in the absence of special circumstances. *Castille*, 489 U.S. at 351. An exact  
 6 correlation of the claims in both state and federal court is not required. *Rice*, 44 F.3d at 1403.  
 7 The substance of the federal claim, however, must have been fairly presented to the state  
 8 courts. *Chacon v. Wood*, 36 F.3d 1459, 1467 (9<sup>th</sup> Cir. 1994) (citations omitted).

9 A petitioner may also exhaust his claims by either showing that a state court found his  
 10 claims defaulted on procedural grounds or, if he never presented his claims in any forum, that  
 11 no state remedies remain available to him. *See Jackson v. Cupp*, 693 F.2d 867, 869 (9<sup>th</sup> Cir.  
 12 1982). "To exhaust one's state court remedies in Arizona, a petitioner must first raise the  
 13 claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction  
 14 relief pursuant to Rule 32," *Roettgen v. Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994), and then  
 15 present his claims to the Arizona Court of Appeals. *See Swoopes*, 196 F.3d 1008, 1010 9<sup>th</sup>  
 16 Cir. 1999).

# 17 **1. Petitioner's *Cronic* claim**

## 18 **a. Failure to exhaust in state court**

19 A review of the record supports Respondents' contention that Petitioner did not  
 20 exhaust his *Cronic* claim in state court. In fact, Petitioner never cites *Cronic* in his state court  
 21 filings and it is only when he reached the Arizona Supreme Court that he raised a claim  
 22 founded on the legal principles outlined in the *Cronic* decision. In *Cronic*, the Supreme  
 23 Court indicated that, unlike an IAC claim under *Strickland*, prejudice is presumed when  
 24 "there [is] a breakdown in the adversarial process," such that "counsel entirely fails to subject  
 25 the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 662. In  
 26 his petition to the Arizona Supreme Court, Petitioner took from *Cronic* almost verbatim when  
 27 he argued that his counsel had not subjected the state's case to "meaningful adversarial  
 28

1 testing,” and noted that in such cases “no showing of prejudice is required.” Exh. I, p. 2.  
2 This is the only time this claim appears in Petitioner’s state court proceedings.

3 In his reply, Petitioner argues that by raising an IAC claim in state court, he preserved  
4 his claim under *Cronic*. Petitioner argues that, “[a]lthough it is not clear why, the State  
5 suggests that *Cronic* is a separate species of ineffective assistance of counsel claims that must  
6 be explicitly cited to preserve the issue for review.” *Reply*, p. 3. However, Petitioner’s  
7 argument is not correct. In *Bell v. Cone*, 535 U.S. 685 (2002), the United States Supreme  
8 Court noted that the difference between a *Strickland* claim and a *Cronic* claim is a matter  
9 “not of degree but of kind.” *Bell*, 535 U.S. at 697. The state courts in the instant case had  
10 no reason, at least prior to Petitioner’s submission of his petition of his brief to the Arizona  
11 Supreme Court in his PCR proceedings, to analyze his claims under the presumed prejudice  
12 standards of *Cronic*. Understandably, the state court decisions evaluated Petitioner’s IAC  
13 claims under *Strickland*. Therefore, Petitioner has not exhausted his *Cronic* claim. 28  
14 U.S.C. § 2254(b)(1).

15 **b. The claim is procedurally barred.**

16 Under Arizona law, pursuant to Rule 32.2, Ariz.R.Crim.P., a petitioner may not be  
17 granted state court relief on any claim which could have been raised in a prior Rule 32  
18 petition for post-conviction relief. Only if a claim falls within certain exceptions (outlined  
19 in sub-sections (d) through (g) of Rule 32.1) and the petitioner can justify why the claim was  
20 omitted from a prior petition will the preclusive effect of Rule 32.2 be avoided. Here,  
21 Petitioner presents no argument addressing the applicability of any exception provided in  
22 Rule 32. Thus, Petitioner is procedurally barred from now raising his *Cronic* claim in state  
23 court and is thus procedurally defaulted in federal court. *Harris v. Reed*, 489 U.S. 255, 263  
24 (1989) (citations omitted).

25 Because the claim is procedurally defaulted, it can be addressed on the merits only if  
26 Petitioner can demonstrate “cause” for the default and “actual prejudice” as a result of the  
27 alleged violation of federal law, or demonstrates the failure to consider the claim will result  
28

1 in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991);  
2 *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). “Cause” is a legitimate excuse for the default  
3 and “prejudice” is actual harm resulting from the alleged constitutional violation. *Thomas*  
4 *v. Lewis*, 945 F.2d 1119, 1123 (9<sup>th</sup> Cir. 1991). To show cause, a petitioner must ordinarily  
5 demonstrate that “some factor external to the defense” impeded efforts to raise the claim in  
6 state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The fundamental miscarriage of  
7 justice exception is only available “where the petitioner supplements his constitutional claim  
8 with a colorable showing of factual innocence.” *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9<sup>th</sup>  
9 Cir. 1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). As Petitioner has not  
10 argued factual innocence and has not shown that cause and prejudice are present, there is no  
11 basis for review of this claim.

## 12                   **2.       Petitioner did exhaust one *Strickland* claim.**

13           Although Petitioner did not exhaust his *Cronic* component of Ground I, he also  
14 included authority and argument in his habeas petition that establishes that he is also  
15 claiming IAC under the *Strickland* standards. Although there are several components to his  
16 *Strickland* argument there is only one component that was sufficiently raised in the state  
17 courts, the claim that his counsel was ineffective in his handling of Petitioner’s decision not  
18 to testify. State courts are said to have been given a sufficient opportunity to hear an issue  
19 when a petitioner has presented the state court with the claim’s factual and legal basis.  
20 *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (legal basis); *Correll v. Stewart*, 137 F.3d 1404,  
21 1411-12 (9<sup>th</sup> Cri. 1997) (factual basis). Here, Petitioner raised this component of his IAC  
22 claim in his PCR petitions in both the trial court and the Arizona Court of Appeals. *See*  
23 Exhs. E & G. The trial court recognized that Petitioner was arguing that his counsel was  
24 ineffective “for failing to advise, encourage, or prepare him to testify.” Exh. F, p. 2. The  
25 trial court then analyzed and rejected the claim. *Id.*, pp. 2-3. Then the Court of Appeals, in  
26 a Memorandum Decision filed on November 25, 2008, first recognized the claim as counsel’s  
27 “failing to discuss the ‘pros and cons’ of whether to testify, in failing to prepare him in the  
28

1 event that he did decide to testify, and in advising him not to testify.” Exh. H, p. 2 (footnote  
 2 omitted). The appeals court then adopted the trial court’s reasoning wholesale, stating that  
 3 “the trial court clearly and correctly addressed the merits of [Petitioner’s] ineffective  
 4 assistance of counsel claim . . . .” Exh. H. Thus, this portion of Petitioner’s *Strickland* claim  
 5 was exhausted and can be addressed on the merits.

## 6 **B. Merits**

7 Under the AEDPA, a federal court "shall not" grant habeas relief with respect to "any  
 8 claim that was adjudicated on the merits in State court proceedings" unless the state decision  
 9 was (1) contrary to, or an unreasonable application of, clearly established federal law as  
 10 determined by the United States Supreme Court; or (2) based on an unreasonable  
 11 determination of the facts in light of the evidence presented in the State court proceeding.  
 12 28 U.S.C. § 2254(d). *See Williams v. Taylor*, 120 S.Ct. 1495 (2000). A state court's decision  
 13 can be "contrary to" federal law either (1) if it fails to apply the correct controlling authority,  
 14 or (2) if it applies the controlling authority to a case involving facts "materially  
 15 indistinguishable" from those in a controlling case, but nonetheless reaches a different result.  
 16 *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9<sup>th</sup> Cir. 2000). In determining whether a state  
 17 court decision is contrary to federal law, the court must examine the last reasoned decision  
 18 of a state court and the basis of the state court's judgment. *Packer v. Hill*, 277 F.3d 1092,  
 19 1101 (9<sup>th</sup> Cir. 2002). A state court's decision can be an unreasonable application of federal  
 20 law either (1) if it correctly identifies the governing legal principle but applies it to a new set  
 21 of facts in a way that is objectively unreasonable, or (2) if it extends or fails to extend a  
 22 clearly established legal principle to a new context in a way that is objectively unreasonable.  
 23 *Hernandez v. Small*, 282 F.3d 1132 (9<sup>th</sup> Cir. 2002).

### 24 **1. *Strickland* standards for ineffective assistance of counsel**

25 Petitioner alleges that his trial counsel was ineffective for failing to properly assess  
 26 and inform Petitioner of the need for Petitioner to testify. Pursuant to the Sixth Amendment  
 27 of the United States Constitution, a criminal defendant has a right to “effective assistance of  
 28



counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to determine if Petitioner was denied effective assistance of counsel, the court must determine “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* The *Strickland* standard for ineffective assistance of counsel has two components. A defendant must first demonstrate that counsel’s performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed a defendant by the Sixth Amendment. 466 U.S. at 687. It requires the defendant to show that counsel’s conduct “fell below an objective standard of reasonableness.” 466 U.S. at 687-688. Second, a defendant must show that the deficient performance prejudiced the defense, i.e., that counsel’s errors were so serious as to deprive the defendant of a fair trial. 466 U.S. at 687. In other words, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694.

In reviewing counsel’s performance, the court must be highly deferential to counsel’s behavior. “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” 466 U.S. at 689. A reviewing court may first consider the prejudice prong of the *Strickland* test, and if it finds that the alleged unprofessional conduct would not have changed the result of the proceeding, it need not consider the performance prong. *Id.*

### **1. The trial court’s decision was reasonable**

As a threshold matter, the trial court applied the correct controlling authority. The court cited *Strickland* along with relevant Arizona authority and described the two elements to be applied. Then, addressing the IAC claim at hand, the trial court (which issued the last reasoned decision) concluded as follows:

First, Petitioner has not shown that trial counsel’s performance fell below an objective standard of reasonableness. The defendant, alone, has the right to decide whether or not to testify. Petitioner does not claim to have been ignorant of this fact. The court actually advised Petitioner of his right to testify, and explained that he could change his mind at any time.



1 Petitioner made the decision not to testify, and he repeatedly  
2 explains his reasons for making that decision in his Affidavit:  
3 “At that time it was my preference to not testify if I did not have  
4 to. I was afraid of my prior conviction coming up and that it  
5 would hurt me more than help me. (. . . ) again, I told [my  
6 lawyer] my preference not to testify because I was worried  
7 about my prior conviction.” *Affidavit of Petitioner, statements*  
8 *2,3.* According to evidence of the discussions between  
9 Petitioner and counsel (including Petitioner’s own Affidavit),  
10 counsel did not entirely neglect to speak with his client about  
11 testifying, but rather, advised his client against it, and honored  
12 his client’s preference not to. Defense counsel’s performance  
13 does not amount to ineffective assistance, merely because he did  
14 not encourage Petitioner to testify.

15 Petitioner was made aware by the court of his right to testify,  
16 and he was encouraged to do so by defense counsel’s supervisor.  
17 Nevertheless, Petitioner made the decision not to testify.  
18 Petitioner argues that this decision was predicated on his  
19 mistaken belief that his prior felony would be made known to  
20 the jury if he took the stand. He claims that defense counsel was  
21 ineffective in advising him not to testify, as well as failing to  
22 explain to him exactly what would be disclosed to the jury, in  
23 terms of his prior felony. There is limited evidence offered to  
24 indicate exactly what was explained to Petitioner, by counsel, on  
25 this subject. However, the record reveals that the court  
26 explained its ruling on the admissibility of his prior conviction  
27 in Petitioner’s presence. Additionally, the State verbalized, in  
28 Petitioner’s presence, that only the date, time and number of the  
prior conviction would be revealed to the jury if the defendant  
testified. (RT 9/20/05, page 2, lines 15-20). Petitioner should  
have been aware of the extent to which his prior conviction  
would be revealed to the jury, had he paid attention during court  
proceedings. Even if Petitioner could prove that counsel failed  
to adequately explain to him the consequences of testifying, this  
would not rise to the level of ineffective assistance.

Second, Petitioner had not shown that counsel’s performance  
prejudiced him. Even if it were shown that further discussion  
between Petitioner and his counsel would have persuaded him  
to testify, Petitioner would still fail to satisfy the second prong  
of *Strickland*. In order to “demonstrate substantial prejudice  
resulting from ineffective assistance of counsel,” Petitioner must  
show that the absence of his testimony amounted to substantial  
prejudice, without which the outcome of the case would have  
been different. *State v. Ramirez*, 126 Ariz. 464, 467, 616 P.2d  
924, 927 (App. 1980). Petitioner argues that taking the stand  
and explaining his version of events would have persuaded  
jurors to acquit, especially in light of all the evidence. Petitioner  
refers to evidence that he withdrew cash from an ATM as  
particularly supportive of his story that he intended to pay the  
victim for consensual sex.

1 However, it is unclear from Petitioner's argument, how telling  
2 his story to the jury would overshadow the overwhelming  
3 evidence that contradicted it. Evidence such as the medical  
4 report of marks to the victim's neck and knees, as well as the  
5 witness who called 911 after hearing the victim scream, is  
6 inconsistent with Petitioner's defense of consensual sex.  
7 Petitioner has failed to point to any aspect of his hypothetical  
8 testimony that would be so persuasive as to change the outcome  
9 of the trial, especially considering that his version of events was  
10 made known to the jury through documentation of statements he  
11 made to police. Because Petitioner failed to satisfy both prongs  
12 of the *Strickland* test, his claim of ineffective assistance of  
13 counsel, for neglecting to advise, encourage or prepare him to  
14 testify, does not entitle Petitioner to post-conviction relief.

15 Exh. F, pp. 2-3.

16 On habeas review, the state court's factual determinations are presumed correct. 28  
17 U.S.C. § 2254(e)(1). Petitioner has presented no "clear and convincing" evidence that  
18 contradicts the trial court's determination that he was aware of his right to testify and the  
19 extent to which information about his prior felony would be admitted. A defendant in a  
20 criminal case nearly always must confront the "dilemma demanding a choice between  
21 complete silence and presenting a defense . . . ." *Williams v. Florida*, 399 U.S. 78, 84 (1970).  
22 His awareness of this dilemma and the implications is established through his admission that  
23 he feared the impact of impeachment based on his prior conviction. As the trial court found,  
24 Petitioner was concerned that his testimony would "hurt me more than help me." Based on  
25 these expressed concerns, it was reasonable for the trial court to reject Petitioner's claim and  
26 conclude that he had been advised of his right to testify and that his counsel "honored his  
27 client's preference not to."

28 Turning to *Strickland's* prejudice prong, there is no basis for a finding that the trial  
court was unreasonable in concluding that the alleged unprofessional conduct would not have  
changed the result of the proceeding. See 28 U.S.C. § 2254(d)(2). The appropriate inquiry  
is whether the state court's factual determinations on the issue were "objectively  
unreasonable." *Miller-El v. Cockrell* 537 U.S. 322, 340 (2003). The trial court stated that  
it was "unclear from Petitioner's argument, how telling his story to the jury would  
overshadow the overwhelming evidence that contradicted it." The court then reviewed that

evidence, which included the medical report of marks to the victim's neck and knees and the witness testimony from the woman who called 911 after hearing the victim scream. Based on this evidence, it was more than reasonable for the trial court to reject Petitioner's contention that his testimony would have been so persuasive as to change the outcome of the trial. Petitioner has not satisfied his burden with evidence that rebuts the trial court's findings. As such, Petitioner is not entitled to relief on his ineffective assistance of counsel claim.

### **III. RECOMMENDATION**

For all of the above reasons, **THE MAGISTRATE JUDGE RECOMMENDS** that the District Court, after its independent review, issue an Order **dismissing** Petitioner's Petition for Writ of Habeas Corpus (Doc. 1).

This Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment.

However, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the District Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. If any objections are filed, this action should be designated case number: **CV 09-0489-TUC-RCC**. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to *de novo* consideration of the issues. *See United States v. Reyna-Tapia* 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (*en banc*).

DATED this 18<sup>th</sup> day of May, 2011.

  
Jacqueline Marshall  
United States Magistrate Judge